Bail Slip

CRL.A.No.553/99

The Accused No.1 Viz., Kanagu @ Kanagaraj @ Kanagalingam was directed to be released on bail as per order of this Court dated 28.6.2000 and made in Crl.MP.No. 11197 of 1999 in Crl.A.553 of 1999.

The Accused No.2 Viz., Kanagu @ Kanugaraj, was directed to be released on bail as per the order of this Court dated 16.4.2003 and made in Crl.MP.No.3257 of 2003 in Crl.A.553 of 1999.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04-01-2007

CORAM

THE HONOURABLE MR.JUSTICE R.REGUPATHI

Crl. Appeal No. 553 of 1999

1.Kanagu @ Kanagaraj @ Kanagalingam
S/o Kathavarayan

2.Kanagu @ Kanagaraj
S/o Mannankatti .. Appellants/A1 & 2

Versus

State represented by the
Inspector of Police,
D'Nagar Police Station,
Pondicherry. .. Respondent/Complainant

For Appellants : Mr.R.Sankarasubbu

For Respondent : Mr.M.R.Thangavel
Public Prosecutor for Pondicherry.

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PRAYER: Appeal against the judgment dated 07.10.1998 passed in S.C.No.5 of 1995 by the III Additional Sessions Judge, Pondicherry.

J U D G M E N T

Among 11 accused, A-1 and A-2 were convicted for the offence punishable under Section 304 Part I r/w 34 IPC and was sentenced to undergo rigorous imprisonment for nine years. The second appellant is already undergoing imprisonment for life in S.C.No.84 of 1997 and the present sentence has been ordered to run concurrently. The other accused have been acquitted. All the

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accused have been originally charged for an offence under Sections 147, 342 and 302 r/w 149 IPC.

2. The case of the prosecution is that P.W.1 and the deceased are friends. On 12.11.1993 at about 10.00 p.m both the accused were standing on the road leading to their house and were talking. At that time the first accused dashed against P.W.1 and on account of that there was a wordy quarrel. Even prior to this incident there was enmity between the first accused and P.W.1. A-1 ran out shouting that he was assaulted by P.W.1 and within 10 minutes A-1 returned back to the place, where P.W.1 and the deceased were standing, with 15 persons armed with sticks. On seeing the mob nearing, P.W.1 and the deceased ran away. A-1 and A-2 with sticks caused injury on the head of the deceased and the deceased fell down. After seeing this, P.W.1 went to the police station, which is 4 kms away and lodged a report at 11.30 p.m.

3. P.W.8 the Sub Inspector of Police received the complaint and registered a case in Crime No.212 of 1993 for an offence punishable under Sections 147, 148, 307 r/w 149 IPC. Ex.P-7 is the FIR. In the meantime, P.W.4 who is the brother of the deceased rushed to the scene of occurrence, on hearing the occurrence and found the deceased with injuries and took him to the hospital from the scene of occurrence at 2.00 pm. P.W.8 rushed to the scene of occurrence and caused photographs to be taken and prepared rough sketch-Ex.P-8 and Ex.P-9 Observation Mahazar and recovered blood stained earth-M.O.2 and sample earth-M.O.3 under a cover of mahazar Ex.P-10. M.O.1 is the blood stained shirt worn by P.W.4, the brother of the deceased. P.W.8 also examined P.W.1 to P.W.3 and recorded their statements. He has received a telephonic communication from the JIPMER Hospital that the deceased expired at 9.25 a.m on the next day. Ex.P-13 is the death intimation. Ex.P-14 is the wound certificate given by the medical officer.

4. After the death of the deceased, the case has been altered to one under Sections 147, 148, 302 r/w 149 IPC and on receipt of the alteration report Ex.P-15, the Inspector of Police, P.W.9 visited the JIPMER Hospital and took up investigation and examined P.W.1 to P.W.3 again. Inquest was conducted by him over the dead body of the deceased and Ex.P-16 is the inquest report. The clothes of the deceased namely M.Os.4 to 7 were seized under a cover of mahazar Ex.P-17 attested by witnesses. Thereafter, a requisition to conduct postmortem was sent.

5. A-1 and A-2 was arrested on 16.11.1993 and 17.11.1993 respectively. Both the appellants have given statements and in pursuance of which M.O.8 and 9 blood stained casuarina sticks were recovered in the presence of P.W.5 and P.w.6, mahazar witnesses under a cover of mahazars Ex.P-19 and Ex.P-21 respectively. After examining the other witnesses, including the medical officer, P.W.9 laid charge sheet on 07.11.1994 for an offence under Sections 147, 148, 341 and 302 r/w 149 IPC.

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6. During the course of trial, P.W.1 to P.W.3 were examined as eye witnesses in the case, of whom, P.W.2 and P.W.3 turned hostile. P.W.4 is the brother of the deceased, who had taken the deceased to the hospital. P.W.5 and P.W.6 are mahazar witnesses for the statements of the accused and recovery of M.Os.8 and M.O.9. P.W.7 is the post mortem Doctor and Ex.P-6 is the post mortem certificate. The medical officer has noticed the following injuries:

"Lacerated wound:

(i) Left fronto parietal region 1.5 cm lateral to midline 6 cms x 2 cms x bone deep.

(ii) left occipital region 5 cm lateral to occipital protuberane 4 cm x 1.5 cm x bone deep.

(iii) Right occipito-parietal regional 2 cm lateral to midline 3 cm x 1.5 cm x bone deep.

Abrasion:

An abrasion is seen present on the left lateral aspect of the lower back 10 cm x 1 cm."

The Doctor has opined that the head injuries are fatal in nature and the external injury is corresponding to the internal head injury.

7. After examination of the witnesses, the appellants were questioned and for which they have claimed innocence. The learned trial Judge on a perusal of the oral and documentary materials and after hearing the arguments made by both the counsel, convicted the appellants above mentioned, resulting in the filing of the present appeal before this Hon'ble Court.

8. A-3 to A-11 were acquitted by the trial Judge as the offence alleged against them was not substantiated. It has been observed that though P.W.1 has stated that a mob, accompanied with the appellants and A-3 to A-11 have chased P.W.1 and the deceased, there is no evidence to substantiate that they have shared the common intention to cause the death of the deceased. However, the learned Judge relying on the evidence of P.W.1 corroborated by the medical evidence and other witnesses held that the appellants caused the head injury with casuarina sticks. It has been held that the appellants had knowledge that such act would cause the death of the deceased. Further it has been held that the act was done with the knowledge that the death is likely to ensure and since there is no intention to cause death, the act of the accused would fall within the ambit of Section 304 Part I IPC, thereby both the appellants have been sentenced to undergo imprisonment for nine years.

9. Learned counsel for the appellants submit that P.W.2 and P.W.3 have turned hostile. P.W.5 mahazar witness also turned hostile. The occurrence alleged to have taken place during night time. Neither in the FIR, nor in the evidence of P.W.1, the presence of the light is not mentioned by P.W.1. In such circumstances, the identity of the appellants during night time

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becomes doubtful. Though it is the case of the prosecution that a mob of 11 accused have assaulted the deceased, the appellants alone have been convicted. As per the FIR, it is the case of the prosecution that all the accused alleged to have assaulted the deceased. It is further submitted that there is no strong enmity to cause the death of the deceased and in such circumstances, this is a fit case for acquittal of the appellants.

10. Per contra the learned Special Public Prosecutor submits that the version of P.W.1 in the FIR and in the evidence is consistent and it is the specific case of P.W.1 that it is only the appellants caused injury on the head of the deceased with casuarina sticks. This evidence of P.W.1 has been corroborated by the evidence of P.W.7, post mortem Doctor. Though there are three injuries on the head of the deceased, the Doctor has opined that the second injury is possible by coming into contact with the surface. In such circumstances, it is contended that the ocular testimony of P.W.1 is corroborated by the medical evidence and even though P.W.2 and P.W.3 have turned hostile, the case of the prosecution has been substantiated. A-3 to A-11 have been rightly acquitted as there is no evidence against them. A case has been registered under Section 302 IPC and as there is no strong enmity for the commission of the offence, the learned trial Judge has rightly convicted the appellants for an offence punishable under Section 304 Part I IPC and in view of the weapon used and the place of injury on the deceased, the sentence also cannot be claimed that it is too severe and sought for confirming the conviction and sentence.

11. I have perused the materials available on record.

12. The evidence of P.W.1 is corroborated by the evidence of P.W.7, the post mortem Doctor. Though the presence of light has not been specifically mentioned in the FIR and in the evidence of P.W.1, it is not the claim of the accused that there was no light at all. The occurrence alleged to have taken place in the main road leading to the air port. The occurrence had taken place at 10.30 p.m and within one hour the report has been given by P.W.1, who is the eye witness in the case to the police station, which is situate 4 kms away.

13. P.W.4 is the brother of the deceased who has reached the scene of occurrence and carried the deceased to the Hospital for treatment. P.W.8 is the Sub Inspector of Police, who initially conducted the investigation and P.W.9 is the Investigating Officer. On a perusal of the reasonings of the learned trial Judge, I am of the opinion that the conclusion reached is well founded and I do not find any merit to disturb such conclusion.

14. The learned counsel for the appellants submit that though the accused were convicted under Section 304 Part I IPC and sentenced to undergo imprisonment for nine years, their age at the time of occurrence is 19 and 18 respectively and in such circumstances, the appellants need not be sent to prison and the

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provisions of Section 360(1) Cr.P.C may be invoked. Section 360(1) Cr.P.C reads as follows:

> "When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

15. Learned counsel appearing for the appellants relied on a judgment reported in 2001(SCC) Crl. 1497 (Mohammad alias Biliya Vs. State of Rajasthan), wherein it is stated as follows:

> "The appellant stood charged under Section 302 IPC but the learned Sessions Judge convicted him under Section 304 Part II IPC and sentenced him to four years imprisonment. Against the order of the learned Sessions Judge, the State and also the appellant had preferred the appeals but both the appeals were dismissed. In this Court when the matter was listed for admission, a limited notice had been given to find out whether the provisions of the Probation of Offendors Act can be given effect to in view of the age of the appellant on the date of the occurrence. On verifying the age of the appellant, Mr.Aruneshwar Gupta, learned counsel appearing for the State states that admittedly the age of the appellant was less than 21 years on the date of the occurrence. In view of the aforesaid, we direct that the appellant be released on probation on executing a bond to the satisfaction of the Magistrate concerned for a period of two years."

16. Learned counsel for the appellants submits that at the time of offence the first accused was 19 years old and subsequently, he got married and settled in life. Apart from the present offence the first appellant is not involved in any other offence. The occurrence alleged to have taken place during 1993 and till today, the first appellant did not come under adverse notice of the police. In such circumstances, the benevolent provisions of Section 360 Cr.P.C may be applied to him and further submitted that the first appellant is willing to execute bond

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along with two sureties who may be closely related to the first appellant. The wife of the first appellant is also willing in this regard.

17. Learned Government Advocate submits that though the second accused is also aged about 18 years, the benevolent provisions under Section 360 Cr.P.C cannot be invoked, since he was already involved in a similar offence, wherein, he has been convicted for life in S.C.No.84 of 1997.

18. I have considered the applicability of Section 360 Cr.P.C for both the appellants and I am of the opinion that in view of the facts and circumstances of the case, that the first appellant alone is entitled for such benefit. The first appellant was arrested on 16.11.1993 during investigation and was in judicial custody upto 16/12/1993. The judgment of the trial Court was delivered on 07.10.1998 and he was taken into judicial custody after conviction. The first appellant was in custody up to 28.06.2000. All put together the first appellant had already undergone imprisonment for one year and 8 months. In such circumstances, while confirming the conviction, taking into account the period already undergone, the sentence imposed on the first appellant is set aside and it is directed that the first appellant be released on probation, on executing a bond to the satisfaction of Judicial Magistrate , Pondicherry for a period of three years with two sureties and one such surety must be the wife of the first appellant. Therefore, in so far as the first appellant is concerned, the appeal is disposed of with the above modification.

19. In so far as the second accused is concerned, in view of the facts and circumstances of the case, I find that the sentence of nine years is too severe and instead it would be suffice to impose a sentence of five years. Accordingly, the sentence of nine years imposed upon A-2 is modified to five years and the same is ordered to run concurrently along with the conviction imposed in S.C.No.84 of 1997.

This appeal stands partly allowed and accordingly ordered.

csh

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

1. The Inspector of Police, D'Nagar Police Station, Pondicherry.

2. The III Additional Sessions Judge, Pondicherry.

3. Do Thro The Prl District & Sessions Judge, Pondicherry,

4. The Judicial Magistrate, Pondicherry,

5. Do Thro The Chief Judicial Magistrate, Pondicherry.

6. The Superintendent, Central Prison, Pondicherry.

7. The Public Prosecutor, Pondicherry.

8. The District Collector, Pondicherry

9. The Director General of Police, Mylapore Chennai 4.

+ 1 cc to the Government Pleader, SR No. 1782

+ 1 cc to Mr. R. Sankara Subbu, Advocate SR No. 903.

AVA(CO)
SR/14.2.2007

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